

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS GEORGE FLINT,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2004

No. 246032

Lenawee Circuit Court

LC No. 00-008882-FC

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to a term of sixty to ninety years' imprisonment. He appeals as of right. We reverse and remand for resentencing.

Defendant was convicted of murdering Russell Smith, an eighty-two-year-old man who died of blunt force trauma to the head, and stab and cutting wounds to the chest and back. Smith was reported missing on November 5, 1999. The following day, Smith's pickup truck was found burning in a remote location. Firefighters determined that arson was the cause of the fire. Smith's body was later discovered in the basement of a house that defendant owned and controlled.

The prosecution's case against defendant was based on substantial circumstantial and physical evidence, and defendant's own statements. On the morning of November 5, 1999, Kassandra VanArnem saw Smith meet with defendant at a condemned house on Church Street in Clinton, Michigan. Defendant and his wife, Sharon Flint (hereinafter "Sharon"), had previously lived in the house, and defendant still had control of the property. VanArnem later saw that Smith's truck was gone from the driveway while defendant's car remained. Later that day, defendant traded tools from Smith's truck to Doug Gurney, a drug dealer, in exchange for crack cocaine. Defendant tried to persuade Gurney to take the truck's parts as well. Early the next morning, defendant asked Sharon to help him get rid of a stolen truck. Sharon was with defendant when he set Smith's truck on fire. Sharon later discovered Smith's partially-hidden body in the basement of the house on Church Street. After defendant was arrested, he asked Sharon to burn a billfold containing Smith's credit card and driver's license.

Police investigators found footprints in the Church Street basement that matched defendant's shoes. Bloodstains matching Smith's DNA profile were found on defendant's pants,

and on a knife and sledgehammer that belonged to defendant. Smith's blood was also found on a paint can lid and on the basement stairs in the Church Street house.

The prosecution also introduced defendant's self-incriminating statements. After defendant was arrested, he attempted to commit suicide in jail. Defendant wrote Sharon a suicide note admitting that he had done a terrible thing. After the suicide attempt, defendant told the officer who was guarding him in the hospital that he had done a very bad thing, and that he wished he were dead. Defendant called Sharon's brother-in-law from jail, and told him to tell Sharon that "I done something very, very bad, and I'll be in here [jail] a mighty, mighty long time."

Defendant was charged with first-degree murder, but the jury convicted him of the lesser offense of second-degree murder. Under the legislative sentencing guidelines, enhanced for an habitual offender, second offense, MCL 769.10, defendant's recommended minimum sentence range was 270 to 562 months in prison. The trial court found that an upward departure was warranted, and sentenced defendant to sixty to ninety years' imprisonment.

## I

Defendant raises several evidentiary issues. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that he asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. To warrant reversal, a defendant must show that, after an examination of the entire cause, it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant's first set of evidentiary issues challenges the admission of evidence on grounds of relevance. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Aldrich, supra* at 114. Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich, supra*. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich, supra*.

Defendant contends that the trial court erred by admitting a letter that he wrote to Sharon from jail. We disagree. Defendant preserved this issue by arguing before the trial court that the letter was inflammatory, and not probative of his guilt. It is apparent from the letter that

defendant was worried that Sharon would tell Detective John Figurski that she burned Smith's wallet on defendant's instructions. In the letter, defendant urged Sharon not to talk to Detective Figurski. The letter was relevant insofar that it showed defendant's efforts to conceal incriminating evidence. The trial court did not abuse its discretion in admitting the letter.

Defendant's next relevance issue arises from Earl Fisher's testimony. Defendant preserved this issue by raising it in a pretrial motion to suppress evidence. We agree that this evidence was not relevant, but find that introduction of the challenged testimony was harmless.

Fisher was an employee of the forensic center, where defendant was hospitalized following his suicide attempt. Fisher testified that while defendant and other patients were watching a television program about a murder investigation, defendant stated that the murderer could have gotten away with the crime by using a paper bag to prevent blood from splattering onto his hand when he stabbed the victim. There was no evidence that defendant used a paper bag in the manner described to protect his hands from blood splatters. Thus, this testimony was not relevant. However, the introduction of the challenged evidence was harmless. In light of the overwhelming evidence of defendant's guilt, it is not more probable than not that the evidence was outcome determinative. *Lukity, supra* at 495-496; MCR 2.613(A); MCL 769.26.

Defendant alleges several evidentiary errors based on the testimony of Lynford Beard. Beard testified that he and defendant were both cocaine users, but defendant injected cocaine, whereas Beard smoked crack cocaine. Defendant argues that this testimony was irrelevant, and intended only to denigrate his character. Because defendant failed to object to this testimony, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). Although the detail that defendant injected his cocaine was not probative of any factual issue, the fact that defendant used cocaine was relevant because it explained his efforts to dispose of incriminating evidence when he gave Smith's tools to Gurney in exchange for cocaine. Defendant's cocaine use was also relevant to defendant's motive to kill Smith, because he bought drugs from Gurney several times a week, he was chronically short of cash, and he considered robbing and killing Gurney a few weeks before Smith was killed. Under these circumstances, the detail that defendant injected cocaine, instead of inhaling or smoking it, did not prejudice defendant and, therefore, did not affect defendant's substantial rights.

Defendant's next claim of error arises from Beard's testimony that defendant stole a pair of welder's safety glasses from Beard. Beard volunteered the information about the theft when the prosecutor asked what kind of sunglasses defendant owned. Defendant did not object, so we review this issue for plain error affecting defendant's substantial rights. *Coy, supra* at 283. We find no plain error affecting defendant's substantial rights. Evidence that defendant owned a particular type of safety glasses was relevant because Beard identified the glasses in a photograph of the crime scene where Smith's body was found. Although the additional evidence of petty theft was not relevant, it could hardly be considered prejudicial in light of the overwhelming evidence supporting that defendant killed Smith.

Defendant's final relevance claim is based on Beard's testimony that defendant talked about committing a robbery a few weeks before Smith was killed. Defendant preserved this issue by objecting on grounds of relevancy. Beard testified that defendant never had money, that he owed rent money to Beard's mother, and that he depended on Sharon's earnings. In mid-

October 1999, defendant told Beard that he planned to get money by robbing a drug dealer in Adrian (presumably Gurney) who always carried at least \$500 in cash. Defendant said he intended to kill the drug dealer and bury his body. Defendant and Beard had this conversation while they were driving to Smith's house, where Smith gave defendant \$30 as a loan or payment for work defendant had done on Smith's house.

The challenged testimony was relevant because it was probative of defendant's motive in killing Smith. Smith's daughter and friend both testified that Smith customarily carried between fifty and a few hundred dollars in his billfold, and that the money was visible when he opened the billfold. The totality of this evidence supported an inference that defendant intended to kill someone in order to steal money, and that he substituted Smith as the victim after realizing that Smith carried large amounts of cash. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

## II

In his second set of evidentiary issues, defendant contends that the prosecutor violated his constitutional right against self-incrimination by introducing evidence that defendant refused to speak to police officers Patrick Bell and David Rivard. Defendant did not object at trial to either witness' testimony. We therefore review this issue for plain error affecting defendant's substantial rights. *People v McNally*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 120021, decided May 4, 2004); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

With respect to Bell's testimony, defendant declined an interview before he was in police custody, and there is no indication that *Miranda*<sup>1</sup> warnings had yet been given. In *People v Schollaert*, 194 Mich App 158, 160-161; 486 NW2d 312 (1992), the defendant claimed that the prosecutor infringed upon his right to silence when he introduced evidence that the defendant remained silent when sheriff's deputies came to his home in the early morning hours to take him to the police station for questioning. The deputies testified that they thought it unusual that the defendant never asked them why they came to his house at that time. *Id.* This Court noted that when the deputies came to the defendant's home, the "defendant was not in a custodial interrogation situation where he was compelled to speak or to assert his right to remain silent." *Id.* at 165. The Court acknowledged that the defendant was "the focus of the police investigation at that point," but declared that "the relevant inquiry is whether he was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way." *Id.* The Court also acknowledged the possibility that the defendant had been in police custody when the deputies were in his house, but noted that "there is nothing in the record to indicate that he was subjected to interrogation or questioning while in his home or that his silence was in reliance on the *Miranda* warnings." *Id.* The Court concluded that under these circumstances, the prosecutor had not infringed on the defendant's right to silence in making the following finding:

In the present case, defendant's silence or non-responsive conduct did not occur during a custodial interrogation situation, nor was it in reliance of the

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 865 S Ct 1602; 16 L Ed 2d 694 (1966).

*Miranda* warnings. Therefore, we believe that defendant's silence . . . was not a constitutionally protected silence. On the basis of our reading of the Michigan Constitution, together with developments in Fifth and Fourteenth Amendment jurisprudence, we conclude that defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence. [*Id.* at 166-167.]

In the present case, defendant was not in custody when Bell requested an interview, and Bell did not pursue attempts to question him or take him into custody. It is not clear that the police were yet focusing on him as a suspect. Smith's body had not been found, so the police were not even certain that they were investigating a homicide. Accordingly, defendant's silence did not occur in the setting of a custodial interrogation, and there is no indication that defendant was relying on *Miranda* warnings when he declined the interview. Consequently, the challenged testimony was not plain error.

We likewise conclude that Rivard's testimony was not plain error. Rivard testified that defendant made a vague, but incriminating statement, but declined when Rivard asked defendant whether he wanted to speak to him. Although defendant was in police custody at this time, and there is no indication of whether or how recently he received *Miranda* warnings, there was no interrogation because defendant initiated the conversation by telling Rivard that he had done a very bad thing. Having initiated the conversation, defendant waived his right to remain silent. In *People v Cetlinski*, 435 Mich 742, 749; 460 NW2d 534 (1990), our Supreme Court stated:

When an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. The omission is nonverbal conduct that is to be considered an assertion of the nonexistence of the fact testified to at trial if a rational juror could draw an inference of inconsistency.

See also *People v McReavy*, 436 Mich 197, 213-215; 462 NW2d 1 (1990) (holding that under the "rule of completeness," all of a defendant's voluntary statement is admissible, including demeanor and nonresponsive conduct). Although these cases are not strictly on point, because they involved defendants who affirmatively waived the right to remain silent, as opposed to a defendant who simply initiated a conversation, the above cases nonetheless establish that defendant's "silence" or refusal to answer certain questions are admissible when they occur in the context of voluntary statements.

For the above reasons, defendant has failed to show that the challenged testimony constituted plain error. *Carines, supra* at 763. Furthermore, had there been error in admitting the testimony, defendant has failed to show that the error affected his substantial rights. *Id.* Defendant's decision to decline Bell's interview carried little weight in contrast to the substantial evidence of defendant's guilt. Defendant's decision to decline Rivard's suggestion that he speak with Rivard or Figurski also carried little weight considering the totality of the evidence against him, especially when defendant contemporaneously told Rivard that he had done a bad thing that would ruin his life.

### III

Defendant claims that he was prejudiced by inadmissible hearsay when Officer Bell testified that he interviewed VanArnem, and recounted her statement about seeing defendant and Smith at the Church Street house on the day Smith disappeared. However, it was defendant who elicited Bell's hearsay response on cross-examination, apparently to follow up on VanArnem's testimony on cross-examination that the officer inaccurately recorded the statement she gave. We will not allow defendant to harbor error as an "appellate parachute" by allowing him to assign error to a question his own counsel deemed proper at trial. *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002). In any event, Bell's testimony was largely cumulative of VanArnem's testimony, and, thus, did not give the jury any information that it did not already have. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). For these reasons, we reject this claim of error.

#### IV

Defendant challenges the prosecution's introduction of expert testimony on hair sample identification. Five human hairs were found on a pipe wrench that was suspected to have been used as a weapon in Smith's murder. Julie Anne Howenstine, a Michigan State Police biologist, determined that the hairs on the wrench were similar to Smith's hair, and dissimilar to defendant's. Howenstine stated that hair samples cannot be positively identified, but individuals can be ruled out as the source of hairs. Defendant did not object to Howenstine's testimony. We, therefore, review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 463.

This Court held in *People v Vettese*, 195 Mich App 235, 240-241; 489 NW2d 514 (1992), that microscopic hair analysis satisfies the *Davis-Frye*<sup>2</sup> test for admissibility of scientific opinion testimony. Defendant acknowledges the holding in *Vettese*, but relies instead on *Williamson v Reynolds*, 904 F Supp 1529 (ED Okla, 1995) ("*Williamson I*"), affirmed sub nom *Williamson v Ward*, 110 F3d 1508 (CA 10, 1997) ("*Williamson II*"), abrogated on other grounds in *Nguyen v Reynolds*, 131 F3d 1340 (CA 10, 1997). In *Williamson I*, the federal district court conducted a habeas review of the defendant's state court murder conviction and death sentence. *Williamson I, supra* at 1534. The defendant challenged his conviction and sentence on several grounds, including that the trial court erroneously permitted expert testimony on hair analysis. *Id.* at 1553. The district court engaged in an in-depth examination of hair analysis, and concluded, pursuant to *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), that expert testimony on hair analysis was too scientifically unreliable to be admissible. *Williamson I, supra* at 1553-1558.

The Tenth Circuit subsequently reversed the district court's decision on the hair sample evidentiary issue. *Williamson II, supra* at 1523. The Tenth Circuit held that the district court erred in reviewing the question as an evidentiary issue under *Daubert*. *Id.* The Tenth Circuit stated that when a state defendant seeking habeas review raises an evidentiary issue, the proper inquiry for the federal court is "whether the error, if any, was so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Id.* at

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<sup>2</sup> *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 293 F 1013 (1923).

1522. Accordingly, the district court erred in ruling that the evidence was inadmissible. *Id.* at 1523.

*Vettese* is binding on this Court pursuant to MCR 7.215(J)(1). In contrast, *Williamson I* is, at best, persuasive dicta following the Tenth Circuit's partial reversal. See *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999). Defendant further suggests that this Court look to *Daubert* for guidance in determining the admissibility of scientific evidence. In *People v McMillan*, 213 Mich App 134, 137 n 2; 539 NW2d 553 (1995), this Court stated that Michigan courts must continue to follow the *Davis-Frye* standard for determining the admissibility of scientific evidence "until the Michigan Supreme Court overrules or modifies its decisions in this area."

Because Michigan precedent has clearly endorsed the admissibility of hair analysis testimony, defendant cannot show that Howenstine's testimony constituted plain error.

## V

Defendant raises two claims of ineffective assistance of counsel. Because defendant did not raise these claims in a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record.<sup>3</sup> *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and, (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Defendant claims that trial counsel was ineffective for failing to seek the appointment of an expert witness on "paint splatter." There was no evidence in this case concerning "paint splatter," so we assume defendant means blood spatter, or bloodstain pattern analysis.<sup>4</sup> The trial court has discretion to appoint an expert witness for an indigent defendant, but the defendant must demonstrate a "nexus between the facts of the case and the need for an expert." *People v*

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<sup>3</sup> Defendant moved for a new trial, but the only ineffective assistance of counsel claim raised in that motion alleged that trial counsel was deficient for failing to seek appointment of a DNA expert.

<sup>4</sup> Ann Elizabeth Chamberlain testified as an expert on bloodstain pattern analysis. Chamberlain testified that a bloodstain found on a paint can in the Church Street basement was an "impact spatter," meaning that a forceful blow to the victim's body caused the victim's blood to spurt or spray onto the paint can. DNA analysis showed that the blood on the can came from Smith. Although not conclusive, Chamberlain's testimony gave rise to an inference that defendant was near Smith when a violent force caused Smith to bleed.

*Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003) (citations and internal quotation marks omitted); MCL 777.15. Our Supreme Court held in *Tanner* that “[it] is not enough for the defendant to show a mere possibility of assistance from the requested expert” and that a trial court does not abuse its discretion in denying a defendant’s motion for appointment of an expert witness absent an indication that the defendant would likely benefit from expert testimony. *Tanner*, *supra* at 443.

Here, there is nothing in the record to indicate that defense counsel was deficient in failing to seek the appointment of an expert. Defendant has not shown that an expert could have propounded any exculpatory explanation of the bloodstains. Defendant contends that his own expert “might have significantly undercut the strength of the prosecutor’s case,” and might have established that the prosecutor’s expert misinterpreted the evidence, but this assertion establishes nothing more than a “mere possibility” of assistance. *Id.* at 443. Consequently, there is no indication that defense counsel could have demonstrated a nexus between the facts of this case and defendant’s need for a bloodstain expert. *Id.* Because defendant has not demonstrated that trial counsel had good cause to seek the appointment of an expert witness, he cannot establish either that trial counsel committed an objectively unreasonable error, or that he was prejudiced by the purported error. *Carbin*, *supra* at 599-600; see also *Snider*, *supra* at 425 (trial counsel “is not required to advocate a meritless position”).

Defendant also argues that trial counsel’s performance was deficient because he failed to rebut Beard’s testimony that defendant was angry on November 5, 1999, because his wife did not receive her paycheck. Defendant suggests that trial counsel could have used Sharon’s employment records to disprove this allegation. However, nothing in the record supports defendant’s claim about employment records, so defendant cannot establish either prong of the ineffective assistance of counsel test. *Carbin*, *supra* at 599-600.

## VI

Defendant next argues that the trial court improperly exceeded the minimum sentence range prescribed by the legislative sentencing guidelines. We agree.

In order to challenge a minimum sentence that is longer or more severe than the appropriate sentencing guidelines range, a defendant must provide this Court with the presentence investigation report and any other documents used by the trial court in imposing the sentence. MCL 769.34(7); MCR 7.212(C)(7). Defendant has provided the transcript from the sentencing proceeding, however, the presentence investigation report and other documents used by the trial court in imposing the sentence were not furnished. Thus, defendant did not comply with MCL 769.34(8) or MCR 7.212(C)(7), requiring that he submit a copy of the presentence investigation report and other information on appeal. See also *People v Lawrence*, 246 Mich App 260, 261 n 1; 632 NW2d 156 (2001). Nonetheless, we will address the merits of this issue because the information we need for review can be gleaned from the sentencing transcript, the lower court file, and the parties’ briefs to the extent they do not conflict.

Generally, under the sentencing guidelines act, a court must impose a sentence within the appropriate sentence range. MCL 769.34(2), *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL

769.34(3), *Hegwood*, *supra* at 439. A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3), *People v Hendrick*, 261 Mich App 673, 682 NW2d \_\_\_\_ (2004). Factors meriting departure must be objective and verifiable, must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). And, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 264.

If the sentence constituted a departure from the guidelines range and this Court finds that the trial court did not have a substantial and compelling reason for the departure, this Court must remand for resentencing. MCL 769.34(11), *Babcock*, *supra* at 265. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Babcock*, *supra* at 258-259.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In terms of sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock*, *supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

Defendant's sentencing guidelines range was 270 to 562 months. The trial court exceeded this range, sentencing defendant to sixty to ninety years' imprisonment. As reasons for the upward departure, the trial court stated:

In determining the appropriate sentence in this case, the Court has considered the seriousness of the offense, your history, principal proportionality, the statutory penalty, the cost of confinement, the sentencing guidelines, report and recommendation of the probation department, and what has been said upon the record at this hearing.

The criteria and the reasons for this sentence are the nature and the gravity of this offense, the discipline appropriate to its commission, deterrence against repetition by you and by others, potential for reformation, vindication of the law and protection of society.

\* \* \*

This is the second conviction you've had for the death of another human being.

\* \* \*

The evidence of your guilt was overwhelming. The jury found you guilty of 2nd degree murder beyond a reasonable doubt. The reasonable doubt standard applies to guilt or innocence. It does not apply to sentencing.

A preponderance of the evidence clearly shows that this murder was premeditated, that you lured this gentleman, your prey, into your basement, where he would be helpless, where he would be away from anyone who could help him. And you did this for one purpose and one purpose alone, to murder him, to rob him, to get his truck, to get his money.

You brutally beat him to death, the second person you've brutally beaten to death. You were out of prison for just three and a half years. I, too, am convinced that you will kill again.

For the reasons I've indicated, premeditation, the short time that you were out of prison, the short time you were off parole, the fact that you will kill again, that the guidelines should be exceeded.

The trial court stated both objective and verifiable factors for its departure and factors that are not objective and verifiable. "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, 261 Mich App 624, 636 NW2d \_\_ (2004). Deterrence against repetition, potential for reformation, vindication of the law and protection of society, and the fact that the trial court is convinced defendant "will kill again," are not objective and verifiable. And, premeditation is not objective and verifiable as it is a state of mind, although the facts supporting premeditation may be objective and verifiable. Some of the factors stated are based on the trial court's subjective assessment of defendant. For example, speculation that defendant will kill again is not objective and verifiable as it is not external to the mind of the trial judge, but, rather, an internal evaluation that is not capable of external proof. In addition, as a matter of law, protection of society is not objective and verifiable for purposes of departure. *People v Babcock (On Remand)*, 258 Mich App 679, 681; 672 NW2d 533 (2003).

Certain factors articulated by the trial court in departing were also factors already considered in determining the guidelines range and the trial court did not find based on the facts in the record that the characteristics were given inadequate or disproportionate weight. MCL 769.34(3); *Hendrick, supra*. Defendant was scored fifty points for offense variable (OV) 7 based on excessive brutality and was scored fifteen points under OV 10 based, in part, on predatory conduct. Seemingly, the trial court also indicates predatory conduct and excessive brutality as reasons supporting its upward departure. The trial court further indicated that departure was based in part on that fact that it was defendant's second conviction "for the death of another human being." The prior conviction was taken into account in the prior record variable. The trial court did not make a finding that the offense characteristics or offender characteristics discussed above were given inadequate or disproportionate weight.

There is no doubt that some of the factors stated by the trial court are proper objective and verifiable reasons that “keenly” attract and “irresistibly” hold our attention and are of “considerable worth.” *Babcock*, *supra* at 257-258. But we cannot say with certainty that if the trial court only considered the valid factors it would have departed from the guidelines to the same extent. Therefore, we must remand for resentencing. See *id.* at 260.

Defendant also contends that he was deprived of his constitutional right to due process citing *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), for the proposition that a sentencing court may not increase a defendant’s sentence based on facts not decided by the jury. Appellate courts do not unnecessarily decide constitutional issues. *People v Riley*, 465 Mich 442, 447: 636 NW2d 514 (2001). Based on our above resolution, we need not address defendant’s constitutional issue.<sup>5</sup>

## VII

Defendant next contends that the trial court erred in denying his pretrial motion to suppress evidence of a threat he made to Sharon. Sharon testified that defendant threatened to kill her and bury her body in the basement during an argument they had in July 1998. Sharon’s recollection of this threat prompted her to look in the basement of the Church Street house when

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<sup>5</sup> Defendant further relies on *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993), wherein this Court held that the sentencing court erred “in making an independent finding that defendant was guilty of first-degree premeditated murder as a reason for justifying the sentence imposed, in direct contravention of the jury’s verdict of voluntary manslaughter.” This Court noted that the jury could not have accepted the prosecution’s assertion that the evidence showed that the defendant carefully planned the murder, because if it had, it would have convicted the defendant of first-degree premeditated murder and not voluntary manslaughter. *Id.* at 20 n 1. *Fortson* is distinguishable, however, because the sentencing court’s independent finding of premeditated murder actually contradicted the jury’s verdict. The jury rejected the defendant’s self-defense claim, but convicted him of the lesser offense of manslaughter. *Id.* at 17. Under these circumstances, the jury’s voluntary manslaughter verdict was construed as a rejection of both the premeditated murder and self-defense theories, in favor of a positive finding that the defendant acted intentionally, but “under the influence of passion or hot blood produced by adequate provocation.” *Id.* Consequently, the sentencing court’s “independent finding” of premeditated murder was in direct conflict with the jury’s verdict of manslaughter, which necessarily included a factual finding of circumstances that reduced defendant’s culpability from first-degree murder to manslaughter. In contrast, the jury’s second-degree murder verdict in the instant case can be harmonized with the sentencing court’s finding of premeditation by a preponderance of the evidence: the jury might have believed there was premeditation, but not without reasonable doubt. Unlike the *Fortson* jury’s verdict of manslaughter, which subsumed a factual finding of circumstances that reduced the degree of the defendant’s culpability, the jury’s second-degree murder verdict here did not subsume a factual finding that premeditation did not occur. We therefore conclude that *Fortson* does not apply to the circumstances of this case.

she began to suspect that defendant had killed Smith. Sharon's co-worker testified that she overheard defendant make this threat.

Defendant raises a two-fold argument. First, defendant maintains that the testimony should have been excluded on relevance grounds. We disagree. The testimony was relevant to explain why Sharon went to the Church Street basement after realizing that defendant might be involved in Smith's disappearance. Defendant does not specifically argue that this evidence was improper propensity or character evidence under MRE 404(b)(1),<sup>6</sup> although he apparently raised this argument when the prosecutor previously sought to admit the evidence.<sup>7</sup> We briefly note, however, that the evidence was not offered for the improper purpose of showing defendant's character or propensity to commit the charged crime, but rather to show defendant's scheme, plan, or system, and to explain Sharon's reason for investigating the basement. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

Defendant also claims that admission of the evidence was contrary to this Court's prior decision. In 2001, the trial court denied the prosecutor's motion in limine to admit several items of evidence, including the threat to kill Sharon and bury her in the basement, and instances where defendant assaulted Sharon. The prosecutor filed an interlocutory appeal and this Court determined that evidence of defendant's abusive conduct toward Sharon was offered for a proper noncharacter purpose of bolstering Sharon's credibility. However, the Court concluded that the trial court properly excluded the evidence under MRE 403:

In light of the fact that defendant's wife eventually did provide the police information regarding defendant, the evidence of defendant's domestic abuse against his wife as an explanation why she might have been reluctant to come forward has limited probative value in determining her credibility. The fact that defendant committed acts of violence against his wife, essentially unrelated to the instant murder, creates a substantial risk of inflaming the jury to believe that defendant has a propensity towards violence, lacks morals, and therefore might be guilty of the victim's murder. Because the risk of unfair prejudice to defendant arising from the evidence of domestic abuse substantially outweighs any probative value the evidence possesses, MRE 403, we cannot conclude that the

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<sup>6</sup> MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

<sup>7</sup> See *People v Flint*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2002 (Docket No. 232534).

trial court abused its discretion in denying the admission of the evidence. [*Flint, supra* at slip op pp 15-16.]

The law of the case doctrine bars both the trial court and this Court from reconsidering an issue already decided by an equal or superior court during earlier proceedings in the same case. *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119 (1998). However, this Court has declined to apply the law of the case doctrine where the issue in the subsequent appeal was not squarely presented in the first appeal. *People v Goliday*, 153 Mich App 29, 33; 394 NW2d 476 (1986). Here, this Court did not squarely address the specific question of whether defendant's prior threat was admissible for the specific purpose of explaining Sharon's conduct. Instead, it determined that the trial court properly excluded the domestic violence evidence where it was offered for the general (and unnecessary) purpose of bolstering Sharon's credibility. Consequently, the law of the case doctrine did not preclude the trial court from considering the narrow, specific issue.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jessica R. Cooper